Shell Electric *and* International Brotherhood of Eelectrical Workers, Local Union 24. Cases 5–CA–25778 and 5–CA–26135

May 29, 1998

DECISION AND ORDER

BY MEMBERS LIEBMAN, HURTGEN, AND BRAME

On November 19, 1997, Administrative Law Judge James L. Rose issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions and to adopt his recommended Order as modified below.[1]

In adopting the judge's dismissal of the 8(a)(3) allegations, we emphasize his finding that, even assuming that Daryl Martell, the Respondent's president, might be found to have had knowledge that the job applicants were members of the Union, the record does not contain substantial evidence of antiunion animus or that the refusal to hire the applicants was motivated by their union affiliation.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Shell Electric, Baltimore, Maryland, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute the following for paragraph 2(a).

''(a) Within 14 days after service by the Region, post at its Baltimore, Maryland facility copies of the attached notice marked 'Appendix.'[4] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 8, 1995.''

Steven L. Sokolow, Esq., for the General Counsel.
Joseph T. Mallon Jr., Esq., of Baltimore, Maryland, for the Respondent.

DECISION

STATEMENT OF THE CASE

JAMES L. ROSE, Administrative Law Judge. This matter was tried before me at Baltimore, Maryland, on August 20, 1997, on the General Counsel's complaint which alleged principally that the Respondent failed to hire, or consider for hiring, seven[1] members of the Charging Party in violation of Section 8(a)(3) of the National Labor Relations Act (the Act). It was also alleged that the Respondent committed several violations of Section 8(a)(1). The Respondent generally denied that it violated the Act.

On the record as a whole, including my observation of the witnesses, briefs, and arguments of counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Maryland corporation engaged contracting commercial and residential electrical services, during the course of which business it annually receives at its Baltimore, Maryland facility goods, products, and materials valued in excess of $50,000 directly from points outside the State of Maryland and annually performs services valued in excess of $50,000 in States other than Maryland. I therefore conclude that the Respondent is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Electrical Workers, Local Union 24 (the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

The Respondent was organized in 1994 and began operations in January 1995. The Respondent's president is Daryl

[1] In accord with *Excel Container, Inc.*, 325 NLRB No. 14 (Nov. 7, 1997), we shall change the date in par. 2(a) of the recommended Order from Nov. 19, 1997 (the date of the judge's recommended Order) to Nov. 8, 1995, the date of the first unfair labor practice.

[2] In finding that the Respondent showed no animus against the Union by failing to hire five applicants, the judge relied, inter alia, on the fact that the Respondent had hired a number of union members, including Brian Fults. In support of his finding that the Respondent was aware of applicant Fults' union membership, the judge relied on Fults' employment application. There is no such application in evidence; Fults testified that the Respondent's president, Martell, said that he lost Fults' application. We correct this factual error which does not affect the result in this case.

[1] In his posthearing brief, counsel for the General Counsel moved to amend the complaint to remove the names of two alleged discriminatees, Kevin Keavney and Francis Kirby, since no evidence was presented to support the allegations concerning them. The motion is granted.

Martell, a journeyman electrician with about 12 years' experience. The Respondent's superintendent is Joseph Stratton. In addition to these two, the Respondent generally employs about eight others, including one to four mechanics, helpers, and office employees.

During 1995,[2] from July on, the Respondent periodically ran ads in the Baltimore Sun for electricians and helpers. Each of the five alleged discriminatees responded by telephone to one of these ads. Others did also, however except for five union members who were either hired or offered a job, the record is devoid of evidence concerning who answered the ads, their union affiliation, if any, and whether they were considered for hire.

Michael Berg is a journeyman electrician and a member of the Union. He called in response to an ad in July and talked to a woman who identified herself as Kim. According to Berg, she asked if he belonged to a union and he said he did, to IBEW Local 24. She said someone would call him, but he received no call. He again responded to an ad in November and again spoke to Kim. This time she asked him some trade questions, the employers he had worked for, the wage he was seeking, and other questions. Then she said someone would call, but again no one did. Finally, Berg called again in January 1996, and was asked generally the same questions, with the same result.

James Loftis is a journeyman electrician and a member of the Union. He also responded to the July ad and spoke to a Mrs. Anderson, who asked his wage demand, and previous employers. He was never contacted by the Respondent. He again called about the November ad. Someone took his name and number, but he was not contacted.

Louis Clark is a journeyman electrician and a member of the Union. He responded to the July ad and talked to a person identifying herself as Renee and then to Martell, who gave him ''an on-phone application, I guess you'd call it, a small test, a quiz.'' Martell also asked about his work experience and Clark named two to four contractors. Martell said he would get back to Clark, but never did.

Clark called again in November and was invited in for an interview. At this he wore either a union jacket or a union hat. According to Clark, but denied by Martell, Martell asked if Clark was hired would he refrain from wearing union clothing. ''Then he went on to ask me, if he hired me, if I could refrain from speaking about union wages and benefits on the job to the other employees.'' On wages, Clark said he wanted $15 or $16 per hour, but Martell said he could only offer $6. Clark testified that he agreed, since this was better than unemployment compensation. And Clark testified that he had the impression he had been hired, but was not further called by Martell nor did he go to work for the Respondent. In fact, he was not, as anticipated, laid off from his current employer (where he was earning $20.10 per hour).

Martell specifically disputed offering Clark $6 per hour, stating such a low wage would have been insulting to a journeyman, such as Clark. Clark's assertion does seem questionable, since Martell in fact paid journeymen between $12 and $15 per hour (the rate offered to Brian Fults in July and at which Brian Shell was hired in December). However, I conclude that this particular conflict is not material and need not be resolved.

Carey Green testified that he answered the Respondent's ad in July, was told that the interviewer was not available and he called back in a couple days. He then talked to Martell. Martell asked a couple technical questions and asked what contractors he had worked for. Green gave him the names of both union and nonunion contractors, but there was no mention of the Union. The interview ended when Martell ''just basically hung up.'' Green has had no subsequent contact with the Respondent.

Lawrence Lister also answered the ad in July, talking to a woman who identified herself as Renee or Rena. She asked some trade questions, his experience, and the contractors he had worked for. She asked no questions about his union affiliation. Lister called back three times, but was never able to reach Martell. He apparently has had no subsequent contact with the Respondent.

Brian Fults is a journeyman electrician and a member of the Union. He also called in response to the ad in July, was interviewed in person by Martell, and was offered a job at $15 per hour. Fults declined the offer.

Brian Shell is also a journeyman, having completed the apprenticeship training program in June, and a member of the Union. In December he had heard from ''my union brothers'' that the Respondent was taking applications, so Shell went by the shop and put in an application. He first met the secretary and then Martell. During the course of his interview with Martell, ''[t]hey [Martell and presumably Stratton] just made notes that my references were union contractors.'' Two days later he was called by Martell and offered a job at $15 per hour. Shell worked for the Respondent 3-1/2 weeks before quitting.

B. *Analysis and Concluding Findings*

1. The alleged discriminatory refusal to hire

To establish a case of discriminatory refusal to hire, certain elements must be proven, as counsel for the General Counsel notes: the individual applied for a job opening, was known, or could reasonably be expected, to be a member of a union against which the employer had animus and the employer refused to hire the applicant because of that animus. It is not, however, a a prima facie violation of the Act where a nonunion employer fails to hire a union member. There must be some proof of knowledge, animus, and causal connection. *Dorey Electric Co.*, 312 NLRB 150 (1993).

Unquestionably, the five individuals named in the complaint applied for jobs with the Respondent and were not hired. The General Counsel asserts that their known union membership, or support, can be inferred from the fact that they named union employers in their applications and Martell must have known those employers were union because he had worked at the trade in the Baltimore area for 10 years. While this may be some evidence of company knowledge, the Board has never held that such is sufficient to establish knowledge of union membership. See, e.g., *Tyger Construction Co.*, 296 NLRB 29 (1989), where it was held that naming union employers on an applications was not enough to establish knowledge. In *Fluor Daniel, Inc.*, 304 NLRB 970 (1991), relied on by the General Counsel, there were additional factors, such as a mass filing of applications and state-

[2] All dates are in 1995, unless otherwise indicated.

ments on the applications to the effect that the individual was a union organizer.

But even assuming that Martell might be found to have had knowledge that these individuals were members of the Union, there is no evidence that he harbored animus against the Union or refused to hire them because of their union affiliation.

Animus, of course, may be inferred, as for instance in *Fluor Daniel*, where the respondent had knowledge of the union affiliation of all 48 alleged discriminatees, none of whom was in called in for an interview, in contrast to those offered jobs who displayed either weak or nonexistent union affiliation. There the Board found that ''such a blatant disparity is sufficient to support a prima facie case of discrimination.''

But such are not the facts here. Thus Ron Oravecz, Brian Shell, Todd Muse, and Bob Wagner all indicated on their applications that they were or had been members of the Union (or a sister local) and all took jobs with the Respondent during the material time. And union member Brian Fults was offered a job which he declined.

Counsel for the General Counsel argues that these facts do not disprove animus. Since Shell was hired after the charge was filed, it is argued that the Respondent was attempting to build a case. Muse indicated on his application that he had not been a member since 1991 when he went into business for himself (an argument I reject because the application does not support this contention). And, Wagner stated in his application that he was seeking steady employment which would allow him to relinquish his membership.

While the Wagner and perhaps the Muse applications may suggest weak union affiliation, such is insufficient to support the inferences argued for by the General Counsel. Indeed, the applications of Oravecz, Shell, and Fults show at least as strong union affiliation as those of the discriminatees. Thus of the 12 mechanics hired from time to time during the material period, four were union members. Another applicant offered a job was a union member. From these facts, the inference of animus against the Union is not warranted.

Finally, there is no direct evidence that Martell had animus against the Union or was motivated in his hiring decisions by the union membership of any applicant. I specifically reject counsel for the General Counsel's contention that a finding of animus should be made because Martell gave ''misleading and deceptive testimony about the hiring of'' Muse and Wagner. (G.C. Br. at p. 13.) I find his testimony concerning the hiring of these individuals consistent with their applications.

I therefore conclude that the General Counsel did not establish a prima facie case that the Respondent discriminated against any of the applicants named in the complaint.

2. The 8(a)(1) allegations

a. *Union insignia*

As noted above, in July Louis Clark called in response to an ad, was interviewed by telephone, and then heard nothing. He called again in November, and this time was invited in for a personal interview with Martell. At the interview, Clark wore either his union jacket or hat, or both, and Martell ''asked me, if he did hire me, if I would refrain from wearing my union clothing and I told him it was my normal work attire, but it wouldn't be too much a major problem.''

Though Martell did not specifically address this conversation, he did deny that he ever requested ''that these employees or any other employees refrain from wearing union insignia.'' From the vagueness of Martell's denial, and specific assertion of Clark, I conclude that he was asked, if hired, not to wear union clothing. I make this finding, notwithstanding my concern about Clark's testimony that he was offered $6 per hour.

Three days after Brian Shell started working for the Respondent, a person he identified as ''Bob'' and as the ''foreman'' said, ''I think you should take them [union] stickers off your lunch box.'' Shell complied.

Absent ''special circumstances'' (not shown to be present here) an employer may not prohibit employees from wearing or displaying union insignia. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); and *Escanaba Paper Co*., 314 NLRB 732 (1994), enfd. sub nom. *NLRB v. Mead Corp*., 73 F.3d 74 (6th Cir. 1996). And by definition, an applicant, such as Clark, is an employee. Therefore, I conclude that Martell violated Section 8(a)(1) by telling Clark he could not wear union clothing if hired.

However, there is insufficient evidence that Shell was told to remove the union stickers by a representative of the Respondent. It is alleged, and denied, that Robert Wagner (presumably the ''Bob'' testified to by Shell) was a supervisor and agent of the Respondent. There is no evidence he functioned in any capacity other than a journeyman. There is no evidence that whoever told Shell to remove the union sticker from his lunch box had a position of authority with the Respondent. Therefore, I conclude that the allegation concerning Shell was not proven by a preponderance of the credible evidence.

b. *Telling employees not to discuss wages*

When Clark was interviewed, Martell also asked ''if he hired me, if I could refrain from speaking about union wages and benefits on the job to other employees.'' This restriction Martell readily admitted. Similarly, Stratton told Shell not to discuss wages with other employees. Stratton also admitted having done so.

Such a restriction on employees amounts to a ''gag order'' prohibiting them from engaging in clearly protected conduct and is therefore violative of Section 8(a)(1) of the Act. *Caterpillar, Inc*., 322 NLRB 674 (1996).

c. *Interrogation*

In paragraph 8 of the complaint, it is alleged that Martell interrogated applicants for employment. No evidence was presented concerning this allegation and it will be dismissed.

REMEDY

Having concluded that the Respondent committed certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Shell Electric, Baltimore, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Prohibiting employees from wearing clothing with union insignia.

(b) Prohibiting employees from discussing wages and other terms and conditions of employment among themselves.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility copies of the attached notice marked ''Appendix.''[4] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since the date of this Order.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

The allegations in the consolidated complaint not specifically found violations of the Act are dismissed.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT prohibit our employees from wearing clothing with union insignia.

WE WILL NOT prohibit our employees from discussing wages and other terms and conditions of employment among themselves.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

SHELL ELECTRIC